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Albertson's, LLC and Yvonne Martinez and United Food and Commercial Workers Union, Local 1564. Cases 28–CA–023387 and 28–CA–023538

October 24, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On July 2, 2013, the Board issued a Decision and Order Remanding in this proceeding, which is reported at 359 NLRB No. 147. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order Remanding, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order Remanding, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order Remanding, and we agree with the rationale set forth therein.¹ Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order Remanding reported at 359 NLRB No. 147, which is incorporated

¹ The complaint allegation remanded to the judge in fn. 1 of the Board's Decision and Order Remanding (that the Respondent violated Sec. 8(a)(1) by orally promulgating a "no talking" rule) was dismissed by the judge and no exceptions were filed. Therefore, we shall omit the portion of the vacated Order that remanded this allegation.

herein by reference.² The judge's recommended Order, as further modified herein, is set forth in full below.³

ORDER

The National Labor Relations Board orders that the Respondent, Albertson's, LLC, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting complaints and grievances from employees in order to discourage them from supporting the United Food and Commercial Workers Union, Local 1564, or any other labor organization.

(b) Engaging in surveillance of employee union or protected concerted activities or creating the impression that employees' union or protected activities are under surveillance.

(c) Implicitly threatening any employees by informing them that management was attempting to make them quit their jobs.

(d) Coercively interrogating employees about matters that are the subject of unfair labor practice proceedings.

(e) Suspending and discharging employees because they engage in activities on behalf of United Food and Commercial Workers Union, Local 1564, or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Yvonne Martinez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Yvonne Martinez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as modified.

² In affirming the Board's finding in sec. 2 of the prior Decision that the Respondent, in disregard of the requirements of *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), violated Sec. 8(a)(1) by failing to obtain the voluntary consent of employee Sebastian Martinez before interviewing him, we do not rely on *General Die Casters*, 359 NLRB No. 7 (2012). We rely instead on *Network Dynamics Cabling*, 351 NLRB 1423, 1426 fn. 12 (2007).

³ In affirming the remedial provisions regarding adverse tax consequences and Social Security reporting requirements in the Decision and Order Remanding, we rely on *Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

(c) Compensate Yvonne Martinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Yvonne Martinez, and within 3 days thereafter notify her in writing that this has been done and that her suspension and discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its store 917 in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 24, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit complaints and grievances from you in order to discourage you from supporting the United Food and Commercial Workers Union, Local 1564, or any other labor organization.

WE WILL NOT engage in surveillance of your union or protected concerted activities or create the impression that your union or protected activities are under surveillance.

WE WILL NOT implicitly threaten you by telling you that we are attempting to make you quit your job.

WE WILL NOT coercively interrogate you about matters that are the subject of unfair labor practice proceedings.

WE WILL NOT suspend or discharge you because you engage in activities on behalf of United Food and

Commercial Workers Union, Local 1564, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Yvonne Martinez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Yvonne Martinez whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, less any net interim earnings, plus interest.

WE WILL compensate Yvonne Martinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful suspension and discharge of Yvonne Martinez, and WE WILL, within 3 days thereafter, notify her in

writing that this has been done and that her suspension and discharge will not be used against her in any way.

ALBERSTON'S, LLC

The Board's decision can be found at www.nlr.gov/case/28-CA-023387 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

